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Analysis of HB 4240

by the Michigan Unemployment Insurance Project*

March 13, 2013

Summary: As written HB 4240 has significant practical and legal problems that should raise concerns with Employers, Claimants and the Unemployment Insurance Agency.

Employers:

- *Cost* - Once a test is administered and the results contested, to meet due process standards, a confirming test must be run and paid for. If an applicant contests the results of a test the only party capable of proving the results is the potential employer who administered it. If that potential employer or the claimant reports the results the potential employer would be required to go through the time and expense to appear at a hearing and defend the results of the test they administered.
- *Privacy* - drug test results fall under federal privacy protections. Release of the results to a 3rd party without the uncoerced consent of the applicant could create federal privacy liability for the employer.
- *Unfair Cost Shifting* - the potential employer who administered the test is not a chargeable employer for that claimant. Yet, that employer would bear the cost and expense of proving the test results if contested whether they reported it or not.
- *Lessons from Wisconsin* - A similar measure was enacted in 2011 then shortly thereafter repealed because of employer concerns.

Claimants:

- *Due Process* - requiring the claimant to answer a Marvin question regarding the results of a test raises 5th amendment concerns.
- *Burden of Proof Chaos* - if a claimant contests the test results this appears to require that a claimant prove something that s/he has no ability to prove: that s/he didn't test positive on a test, the results of which, have not been proven. In a normal misconduct drug test disqualification the employer has the burden to prove a positive drug test. If that same principle were applied to this situation a non-chargeable disinterested potential employer would have the burden to prove the positive drug test they administered. Under the current rules they don't even have a right to participate in the administrative hearing or contest eligibility for benefits.

Unemployment Insurance Agency:

The arbitrary 20 week ineligibility provision creates significant federal compliance problems for the Agency.

- *Claimants Must be Allowed to Cure Availability Problems* - Under federal law a person must be able and available for work in a week they claim benefits to be eligible for benefits. Availability is assessed on a week by week basis. 20 CFR 604. The arbitrary 20 week ineligibility provision in this bill does not comply with this week by week eligibility assessment. Arguably a person may be unavailable for the type of work that requires them to pass a drug test in the week they fail a drug test. However, it does not mean

that they could not pass a drug test and be available for that type of work the next week. Just because a person fails a drug test one week does not mean they would fail it the next. Federal law requires that claimant be allowed to cure an availability problem if the impediment to their availability is removed. The arbitrary 20 week ineligibility provision does not allow claimants to cure.

- *Illegal Fixed Penalty* - The arbitrary 20 week ineligibility provision creates a fixed penalty period for an eligibility determination that is only allowed for disqualification determinations such as misconduct or voluntary quit.

* The Michigan Unemployment Insurance Project is a non-partisan, non-profit law firm that works with law students at Michigan's five law schools to provide assistance to Unemployment Insurance claimants. For more information, please contact:

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